NO. 47683-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD R. KASS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it could infer a person acted with intent to commit a crime if he entered or remained in the building unlawfully.

2. The offender score was not properly calculated.

3. The state failed to prove the facts supporting the offender score by a preponderance of the evidence.

4. The trial court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c).

5. The judgment and sentence contains a scrivener's error as to the date of the jury's verdict.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury instruction which contains a permissive inference that is the sole and sufficient evidence of the presumed fact is unconstitutional. It violates the defendant's due process right because it allows the prosecution to avoid proving every element of the crime charged. The instruction in Mr. Kass's case allowed the jury to infer he acted with an intent to commit a crime in Mr. Knipe's house from the "basic fact" that he was in the house without permission. Did the trial court err when it gave the jury a permissive inference instruction in Mr. Kass's case?

2. Pursuant to the Sentencing Reform Act (SRA) and the Due Process Clause, the state must prove an offender score by a preponderance of the evidence. Did the state fail to satisfy its burden where the record submitted did not support the proffered offender score?

3. A trial court is required to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c). The trial court has not entered CrR 3.5 findings and conclusions. Is the trial court's failure to do so in error?

4. Mr. Kass is entitled to a judgment and sentence without scrivener's errors. His judgment and sentence misstates the date of the jury's verdict. Should his case be remanded to correct the judgment and sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

The state charged Richard Kass with a single count of Residential Burglary. CP 1. Mr. Kass moved pre-trial to suppress his identification and the identification of his truck. CP 2-8. The court denied the motion and entered written findings of fact and conclusions of law. RP[1] 1 9-127; CP 13-19.

[1] There are several volumes of verbatim report of proceedings for this appeal. The specific volumes for the page cite is RP 1, 2, 3A, or 3B.

The court also heard a pre-trial CrR 3.5 hearing and found statements Mr. Kass made to Clark County deputies admissible at trial. RP 2 152-168. To date, the court has not entered supporting written findings and conclusions.

At trial, over Mr. Kass's objection, the court gave Instruction 11, a permissible inference instruction:

> A person who enters or remains unlawfully in a building may be inferred to have acted with the intent to commit a crime against a person or property therein. The inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

RP 3A 359; CP 34.

The jury was also instructed they could consider the lesser included offenses of Burglary in the Second Degree and Criminal Trespass in the First Degree. RP 3A 329, 350; CP 40, 42, 43-44.

The jury returned a guilty verdict as charged on May 27, 2015. RP 3B 471; CP 45.

At sentencing, the state presented no evidence of Mr. Kass's prior convictions. RP 3B 481. Mr. Kass did not stipulate to having prior convictions. RP 3B 481-84. The court adopted the prosecutor's suggested offender score of 11 and sentenced Mr. Kass within that standard range to 73 months in prison. RP 3B 486; CP 59, 60.

This appeal follows. CP 55.

2. Trial Testimony

Mr. Kass wanted to buy a motorcycle for his girlfriend. RP 3A 310. He knew there was a motorcycle in the backyard of a house near where he lived in Vancouver. RP 3A 310. The back yard of the house fronted a commercial parking lot and a Safeway. RP 2 213.

Douglas Knipe owned the house. RP 2 209. He had not been living in it for about two months. RP 2 210. He moved into an apartment and intended to spend a few months remodeling the house. RP 2 211-12. He visited the house frequently. RP 2 211. One evening, he went to the house late and found the back door forced open and damaged. The house had been ransacked and items taken. RP 2 212. Because he was tired, he did not call the police. Instead, he boarded up the door to secure it and left for the evening. RP 2 212, 226.

The next day, he drove to the neighboring Safeway to get a cup of coffee before returning to the house. RP 2 213. While parked at Safeway, he noticed a dually pickup with a distinctive homemade bed parked near his back fence. The truck was idling when he went into the Safeway and was in the same position when he came out about 10 minutes later. Curious, he drove close to the truck and noticed what he believed was a man sitting in the driver's seat. RP 2 213.

Mr. Knipe drove the few minutes directly to his house and arrived about 1 p.m. RP 2 213, 254. He noticed the same back door had again been forced open. Nervous, he went to his truck and retrieved his handgun. RP 2 313. He went from room to room and looked at the mess and damage. RP 213. He was standing in the living room when Mr. Kass suddenly walked through the curtained slider door and stepped a few feet into the house. Mr. Kass was smoking a cigarette and did not immediately notice Mr. Knipe. RP 2 214-15. Mr. Knipe did not know Mr. Kass and had not invited him into his home. RP 2 240.

Mr. Knipe verbally confronted Mr. Kass. Mr. Kass thought Mr. Knipe's name was John and tried to talk to him. But instead Mr. Knipe pulled out his gun, pointed it at Mr. Kass, and told him not to move. Mr. Knipe called 911. RP 2 214-17.

While Mr. Knipe talked to 911, Mr. Kass took the opportunity to get away from Mr. Knipe and his gun by running back out the slider door. RP 2 218. He ran on a well-travelled path through the back yard, through a hole in the fence, and to the dually truck. Mr. Knipe followed him. The truck's driver was standing outside the truck but quickly got in and the truck drove away. RP 2 218-22. Mr. Knipe thought there was something on the truck's bed that could have been a dresser from his house. He was unsure though and later did not claim a dresser was missing from his house. RP 2 233, 266.

Clark County Deputies arrived at the house in response to the 911 call. RP 3A 289. In Deputy Eric Swenson's experience, it looked like transients had been living in the house. RP 3A 317. Deputy Swenson looked for evidence that someone had been preparing to take property from the house by doing things like stacking items near a door or packing items to carry out. He did not see anything like that. He did not see the two fully packed four-feet tall duffle bags Mr. Knipe said were stuffed with personal property and in the living room near the slider door. RP 2 235; 3A 317-18.

Deputy Swenson used the police radio to put out an attempt to locate for the truck. RP 3A 294. There was no sign of the truck that evening. But the next day Deputy Brian Skordahl saw the truck and pulled it over for traffic infractions, to identify the driver, and to take pictures of the driver and the truck. RP 3A 334-42. The pictures were later shown to Mr. Knipe who identified the truck and the clothing worn by its driver, Mr. Kass, as identical to what he had seen at his house the day before. RP 3A 342-43.

When the police contacted Mr. Kass a few days later at his trailer, Mr. Kass figured the police were there to talk to him about the guy who had put the gun in his face when he was at the house looking at the motorcycle. RP 3A 310-312.

D. ARGUMENT

1. The inference instruction violated Mr. Kass's right to due process of law.

One of the elements the state was required to prove was that Mr. Kass entered or remained unlawfully in Mr. Knipe's house with the intent to do a crime against a person or property therein. CP 38 (Instruction 15). Instruction 11 is a permissive inference instruction. CP 34; *See State v. Brunson*, 128 Wn.2d 98, 105, 905 P.2d 346 (1995) (a permissive inference is one where the jury may find a presumed fact from a proven one, but may decide otherwise). It told the jury it was permitted to infer Mr. Kass intended to commit a crime in the house because he was in the house. The instruction violated Mr. Kass's constitutional right to due process of law to have the jury determine whether the elements of the offense were proven beyond a reasonable doubt. U.S. Const. Amend 14; Wash. Const. Art 1 § 3.

A permissive inference instruction is unconstitutional "unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *County Court of Ulster County v. Allen*, 442 U.S. 140, 166 n.28, 99 S.Ct. 2213, 60 L.Ed 2d 777 (1979) (quoting *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed. 57 (1969); *State v. Randhawa*, 133 Wn.2d 67, 75, 941 P.2d 661 (1997). "When an inference is only part of the prosecution's proof

supporting an element of the crime, due process requires the presumed fact to flow 'more likely than not' from the proof of the basic fact." *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), *cert. denied*, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994)[2] (citing *Ulster County*, 422 U.S. at 165). When an inference is the sole and sufficient proof of an element however, the inference must be shown true beyond a reasonable doubt. *Brunson*, 128 Wn.2d at 110.

Permissive inference instructions are disfavored because they "tend to take the focus away from the elements that must be proved." *United States v. Warren*, 25 F.3d 890, 900 (9th Cir. 1994) (Rymner, J., concurring). They are also disapproved because "[t]hey are most effective when least appropriate: where the evidence supporting the inference is sparse and the inference is most crucial to the government's case." *Id.* at 899; *see also*, *State v. Johnson*, 100 Wn.2d 607, 619-620, 674 P.2d 145 (1983) (an inference is "rarely necessary and usually ill advised").

In *Randhawa*, *supra*, the court reversed the defendant's conviction because the jury was given an unconstitutional permissible inference instruction. Randhawa was charged with vehicular homicide, which required the state to prove reckless driving. The trial court gave a permissive

[2] Hanna's conviction was subsequently reversed in *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996), where the court held the permissive inference instruction in that case was unconstitutional.

inference instruction that allowed the jury to find reckless driving if the defendant was speeding. *Randhawa*, 133 Wn.2d at 75. The evidence showed Randhawa was traveling 10 to 20 miles per hour over the speed limit. *Id.* at 77. The Randhawa court held that the inferred fact of reckless driving did not flow from the fact Randhawa was speeding. *Id.* at 78; *cf. State v. Kenyon*, 123 Wn.2d 720, 871 P.2d 144 (1994) (where the court found the same instruction was not error when the evidence showed the defendant was travelling over twice the speed limit): *see also*, *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999) (where the court found the same instruction was not error when the evidence showed the defendant was traveling forty miles an hour over the speed limit).

The *Randhawa* court reasoned the constitutionality of the inference instruction must be viewed in light of the particular facts of the case and the state's evidence supporting the inference. *Randhawa*, 133 Wn.2d at 76. Under the facts here, the evidence supporting the inference is sparse.

Mr. Kass told the police he went to the home to look at a motorcycle he was interested in acquiring for his girlfriend. RP 3A 310. There was a motorcycle in the yard. RP 2 241. Mr. Kass approached the house via the backyard. RP 3A 310. But the backyard was where the motorcycle was kept. RP 2 241. The path that Mr. Kass traveled through the backyard after being threatened by Mr. Knipe's gun was a well-worn path. RP 3A 310. Mr. Kass

did not run away when he saw Mr. Knipe in the house. Instead, he tried to engage with Mr. Knipe.[3] RP 2 261.

Deputy Swenson thought the interior condition of the house looked like it had been occupied by transients. RP 3A 316-18. Mr. Kass was not a transient. He lived close by in a fifth-wheel trailer. RP 3A 308. Mr. Knipe initially thought the truck waiting outside of the fenced backyard was loaded with a dresser from the home. Mr. Knipe could not support that claim at trial. RP 2 233, 266. Mr. Kass was at all times cooperative with police. RP 2209-13. Mr. Knipe's two large duffle bags stuffed full of personal property and standing up in the living room area were not connected to Mr. Kass. RP 2 235. But Deputy Swenson, who looks for such evidence when investigating alleged burglaries, did not see the two large duffle bags during his investigation. RP 3A 325-26.

Here the inference was the sole and sufficient proof of Mr. Kass's intent to commit a crime in Mr. Knipe's home. Prejudice is presumed when an erroneous instruction is given to the jury. *State v Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The instruction invited the jury to draw the inference Mr. Kass entered the home to commit a crime based solely on his entry into the house by just a few feet and his attempt to talk to Mr. Knipe.

[3] The tenor of the contact changed when Mr. Knipe pulled a gun on Mr. Kass.

Mr. Kass did not try to assault Mr. Knipe. He did not try to take or damage any property. There was simply no evidence Mr. Kass intended to commit a crime in the home. The only proof of the element was through the inference instruction.

Alternatively, even if there was other evidence Mr. Kass intended to commit a crime in the house, the inferred fact of his intent did not rationally flow from his entry into the house.

Under the "more likely than not" or the "reasonable doubt" test, the inference instruction violated Mr. Kass's right to due process of law. Because the evidence of Mr. Kass's intent was directly related to the improper instruction, there is a reasonable doubt that a jury would have reached the same result in the absence of the instruction. *See*, *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1968) (constitutional error is harmless only if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error). Mr. Kass's conviction should be reversed.

2. Mr. Kass's sentence should be remanded because the state failed to present sufficient evidence to support its proffered criminal history.

A challenge to the calculation of an offender score may be raised for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d

497 (1994); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range, he can challenge the procedure by which a sentence within the standard range is imposed. *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. *State v. Mitchell*, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

In Washington, a sentencing court's calculation of a standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which starts with a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525. Our supreme court has consistently held that the state bears the constitutional burden of proving prior convictions by a preponderance of the evidence. *State v. Graciano*, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013) (contrasting burden on prior offense, which state bears by preponderance, with the finding of same criminal conduct); *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); U.S. Const. Amend XIV; Const. Art I § 3. The burden is on the state "because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the state either could not or

chose not to prove.'" *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must support the criminal history determination. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing some minimal indicium of reliability beyond mere allegation.'" Id. (*quoting Ford*, 137 Wn.2d at 481 (emphasis in original)).

A prosecutor's summary of criminal history is not sufficient to satisfy the state's burden. *Hunley*, 175 Wn.2d at 915. "The best evidence of a prior conviction is a certified copy of the judgment and sentence." *Id.* at 910. A defendant must affirmatively acknowledge the "facts and information" the state introduces at sentencing in order to relieve the state of its burden of proof. *Mendoza*, 165 Wn.2d at 928-29. Neither a defendant's failure to object to the prosecuting attorney's statement of criminal history nor his recommendation of a sentence in the same range calculated by the prosecuting attorney constitutes an affirmative acknowledgment of the alleged criminal history. *Id.* at 928.

Mr. Kass did not affirmatively acknowledge his prior criminal history and the prosecutor's unsupported summary of his alleged prior convictions was insufficient to establish Mr. Kass's criminal history by a

preponderance of the evidence. The prosecutor told the court Mr. Kass had an offender score of 11 and a standard range of 63-84 months. RP 3B 481. Mr. Kass's counsel told the court he looked through the state's "packet of priors" but he was not stipulating to any prior convictions.

The state attached Appendix 2.2 Declaration of Criminal History to the Judgement and Sentence. RP 67. Below the caption, there is a paragraph that could suggest agreement in certain circumstances:

> COME NOW the parties, and do hereby declare. Pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions.

CP 69.

But those circumstances do not apply here. Below the list of alleged prior convictions, there are signature lines. Handwritten underneath is "SERVICE ACCEPTED ONLY" followed by the signature of Mr. Kass and defense counsel Mr. Sowder. CP 69. Clearly, neither Mr. Kass nor Mr. Sowder agreed with the state's unsupported calculation of the offender score at 11 points.

Mr. Kass's sentence must be vacated and remanded for resentencing.

3. The trial court erred in failing to enter written findings of fact and conclusions of law per CrR 3.5(c).

The trial court held a CrR 3.5 hearing to determine whether Mr. Kass's statements were the product of police coercion. However, the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c). Even if this court concludes Mr. Kass's statements were admissible, this court must remand the matter for the entry of written findings of fact and conclusions of law as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore." This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Mr. Kass's statements to deputy sheriffs were admissible, but no written findings or conclusions were ever entered. The trial court's failure to enter written findings and conclusions violate the clear requirements of CrR 3.5(c).

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.,* 62 Wn.2d 561,

566-67, 383 P.2d 900 (1963). An oral ruling "has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment." *Id.* at 567 (emphasis added).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court provide the basis for a "consistent, uniform approach." *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). "[A]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Id.* at 624. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

Here, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

4. The trial court should correct the Judgment and Sentence to reflect the correct verdict date.

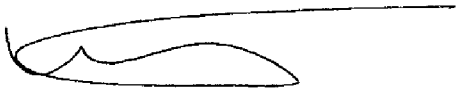
Mr. Kass's Judgment and Sentence contains a scrivener's error that requires correction. Section 2.1 incorrectly notes the jury returned its verdict on July 3, 2015. CP 57. The jury actually returned its verdict on May 27, 2015. CP 45. This court should remand Mr. Kass's case to correct the Judgment and Sentence. *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

E. CONCLUSION

Because the trial court gave an improper inference instruction, Mr. Kass's conviction must be reversed.

Alternatively, Mr. Kass's case must be remanded for resentencing, to enter written CrR 3.5 findings and conclusions, and to correct the scrivener's error in the Judgement and Sentence.

Respectfully submitted January 12, 2016.



LISA E. TABBUT/WSBA 21344
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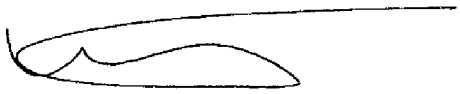
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Richard R. Kass/DOC#975845, Larch Corrections Center, 15314 NE Dole Valley Road, Yacolt, WA 98675.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 12, 2016, in Winthrop, Washington.



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